IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-1307

ISRAEL ESPARZA RANGEL AND DAVID ESPARZA RANGEL, JR., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement of the Case	2
Reasons for Granting the Writ	8
Conclusion	9
Appendix A—Opinion Below	11
Appendix B—Judgment of the Court of Appeals	15

CITATIONS

CASES	Page
Bram v. United States, 168 U.S. 532	7
Miranda v. Arizona, 384 U.S. 436	2, 6, 8
Schneckloth v. Bustamonte, 412 U.S. 218	2, 6, 8
STATUTE	
18 U.S.C. sec. 2511(2)(c)	2, 6, 8

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UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above cause on February 4, 1974.

OPINION BELOW

The opinion of the Court of Appeals is printed in Appendix A of this petition. It has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals is printed in Appendix B of this petition. It was entered on February 4, 1974. No rehearing was applied for. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

QUESTIONS PRESENTED

(1). Does the consent specified in 18 U.S.C. sec. 2511(2)(c) have to be voluntary under the standard applied in *Schneckloth v. Bustamonte,* 412 U.S. 218 (*i.e.,* voluntary in the sense that confessions had to be voluntary prior to *Miranda v. Arizona,* 384 U.S. 436)?

(2). If so, will the prosecution sufficiently carry its burden of showing consent of that kind where, as here, the proof shows actual consent but wholly fails to show no improper influences were exerted by officers in obtaining such consent?

STATUTE INVOLVED

The statute involved is 18 U.S.C. sec. 2511(2)(c). It provides as follows:

> It shall not be unlawful * * * for a person acting under color of law to intercept a wire or oral communication where * * * one of the parties to the communication has given prior consent to such interception.

STATEMENT OF THE CASE

The indictment indicted the following 11 defendants: petitioner Israel Rangel; petitioner David Rangel; Daniel

Lerma; Roumaldo Montemayor; John Doe; Jose Omar Oliverira-Gonzales; Russell Michael de Phillips; Marvin Wayne Howze; Charles Robert Murray; John Frank Harris; and Thomas William Eble. Of these, only two,—*i.e.*, petitioner Israel and petitioner David Rangel.—were tried.

Petitioner Israel Rangel was convicted on one count of importation of marijuana into the United States under 21 U.S.C. secs. 960(a)(1) and 952(a) and on one count of distribution of marijuana under 21 U.S.C. sec. 841(a)(1). Petitioner David Rangel was convicted on one count of distribution. The convictions were affirmed by the Court of Appeals for the Fifth Circuit.

Defendant Gonzales was taken into custody by officers who caught him in the act of loading a station wagon with about 400 pounds of marijuana brought by boat to the American side of the Rio Grande where the station wagon was. Thereafter, he cooperated with the officers by proceeding, while under constant surveillance, to Corpus Christi, Texas to make delivery of the marijuana to the person he said he was supposed to deliver it to, namely, petitioner Israel Rangel.

The station wagon, after remaining parked for some time on the lot of the bond office in Corpus Christi operated by petitioners, was driven by defendant Gonzales to a cafe in the City of Aransas Pass, Texas and from there was driven by defendant Howze to a warehouse in that city. Immediately after its arrival there federal officers subjected it to a search and seized the marijuana. Simultaneously, other officers arrested defendants Harris and Murray who were in a car in which about $33,000 was found. There was proof from which

it reasonably could be inferred that this money would have been paid to petitioners for the marijuana but for the intervention of the officers.

An important part of the prosecution proof consisted of incriminating statements of petitioner Israel Rangel in a telephone conversation evidenced by an electronic tape the trial court allowed the jury to hear twice.

The events which led to that conversation taking place were these: Federal officers had just concluded a seizure of the marijuana. (App. 9).[1] Thereupon other officers brought to the scene a vehicle occupied by defendants Murray and Harris. (App. 9). A search of this vehicle revealed approximately $33,000 in cash. (App. 87). Thereafter, the officers took defendant Murray to the Customs Office in Corpus Christi and there procured him to make a telephone call to petitioner Israel Rangel. (App. 15).

The conversation which took place during this call was recorded on an electronic tape by a device attached to the telephone defendant Murray used. (App. 23). This tape, which was played twice before the jury (App. 27, 85), evidenced the following conversation between petitioner Israel Rangel and defendant Murray:

> "Hello.
> "Is Ray there?
> "Yes, this is Ray.
> "Hey, guy, what's happening?
> "Hey, guy, hey, guy, you got me scared.
> "Huh?

1. In this petition we will use the abbreviation "App." to refer to the Appendix required by Rule 30 of the Federal Rules of Appellate Procedure.

"You got me scared.

"Yeah, I got a little scared, too. We saw a few cars in the area, were just being careful.

"Oh, that's good.

"Where do you want me to meet you? I gotta talk to you, man, that shit's light again.

"Very much?

"Huh?

"Very much?

"Yeah, about twenty-two pounds.

"Hey, come to my house, man. Where are you?

"Where, in Portland?

"Yeah.

"I'm in Rockport right now.

"Well, just come over.

"Over to your place?

"Yeah.

"Okay.

"I'll be waiting for you. I am not gonna go nowhere.

"Okay, take care.

"Okay.

"Bye.

"Bye, bye.

"Hey, is it cool over there?

"Huh?

"Is it cool?

"Very.

"You sure?

"Well, I'm here.

"Okay.

"Okay.

"Okay.

"Bye, bye."

This conversation.—being corroborative of prosecution testimony of defendant Harris that tended to show that the money seized from him and defendant Murray would

have been paid to appellants for the marijuana but for intervention of the officers and that the marijuana was being bought for shipment to Chicago and other places (App. 48-127),—was severely damaging to both petitioners[2] and especially to petitioner Israel Rangel.

The Government was required, as a condition of making this conversation admissible under the provisions of 18 U.S.C. sec. 2511(2)(c), to lay a predicate consisting of proof that would at least prima facie show that, within the meaning of those provisions, defendant Murray consented to the act of the officers in causing an electronic tape to be made of that conversation. Defense counsel, by timely objections made before admission of the conversation, contended that no such predicate had been laid. (App. 25, 27). The trial court overruled those objections (App. 27, 27) and the Court of Appeals held this was correct action.

In the Court of Appeals petitioners argued that consent of the type specified by the provisions of 18 U.S.C. sec. 2511(2)(c), — like consent to search,— will satisfy constitutional requirements only if it is voluntary under the standard applied in *Schneckloth v. Bustamonte*, 412 U.S. 218 (*i.e.*, voluntary in the sense that confessions had to be voluntary prior to *Miranda v. Arizona*, 384 U.S. 436); that, accordingly, the pre-Miranda rule applicable in determining voluntariness of confessions (*i.e.*, the rule imposing on the Government the burden of estab-

2. The trial court instructed the jury to consider this conversation only against petitioner Israel Rangel. (App. 29). But it would be unrealistic to believe the jury was capable of following such an instruction after hearing the testimony given by defendant Harris (App. 48-127). For that reason petitioners contend that petitioner David Rangel suffered equally the damage caused by admission of the conversation.

lishing that a confession was *not* obtained by improper means exerted by officers, *Bram v. United States,* 168 U.S. 532) applies equally in determining voluntariness of consent given to intercept a telephone conversation; and that the burden imposed by that rule on the Government in this case was not carried because the Government left the record silent as to the question whether improper influence were exerted by officers in obtaining from defendant Murray the actual consent he gave to make the electronic tape they made of the conversation he had with petitioner Israel Rangel.[3]

Without mentioning these arguments, the Court of Appeals held that the proof tending to show defendant Murray's actual consent supported the trial court's finding that that consent was given "voluntarily," leaving unconsidered and unaddressed appellants' basic contention that that proof, though concededly permitting an inference of defendant Murray's actual consent, was yet wholly insufficient to show voluntariness of that consent because of the total absence from the record of any

3. The testimony of officer Hale is the only source of evidence as to the circumstances surrounding the making of the tape in question. (App. 5-46). Defendant Murray did not testify. None of officer Hale's testimony tended to show that no improper influences were exerted by him or other officers to induce defendant Murray to give the consent he gave. To the contrary, the record is silent with reference to the question whether improper influences were exerted by officers to induce defendant Murray's consent. Thus the negative fact that there were no such improper influences, which the trial court had to find in order to be authorized to hold that the consent defendant Murray gave was given voluntarily in the pre-Miranda sense, was a fact which that court was unauthorized to infer. The circumstances shown by the record in connection with the consent defendant Murray gave support an inference that he actually consented but shed no light at all on the *quality* of that consent, leaving the trial court with no basis for any finding that there were no improper influences by officers which made him consent.

proof tending to show that no improper influences were exerted by officers against defendant Murray to induce him to consent.

REASONS WHY THE WRIT SHOULD BE GRANTED

The crucial question here is whether (as appellants contend) the consent specified by the provisions of 18 U.S.C. sec. 2511(2)(c) has to be voluntary under the standard applied in *Schneckloth v. Bustamonte*, 412 U.S. 218 (*i.e.*, voluntary in the sense that confessions had to be voluntary prior to *Miranda v. Arizona*, 384 U.S. 436) or whether (as the Court of Appeals impliedly held) that kind of consent is prima facie established by proof which, though showing actual consent, yet wholly fails to show that no improper influences were exerted by officers to induce the consent.

A decision by this Court resolving this question would have significance far beyond this immediate case because those provisions are in a federal statute applicable throughout the United States and because the issues at stake whenever those provisions are invoked are germane to fundamental civil liberties guaranteed by the Constitution. Clearly this question is one of national importance which the Court properly should address.

Resolution of this question favorably to appellants would require a holding that the prosecution does not sufficiently carry its burden of showing consent of the kind specified by 18 U.S.C. sec. 2511(2)(c) where, as here, the proof shows actual consent but wholly fails to show that no improper influences were exerted by officers in obtaining such consent. We urge the Court to make such a holding

and, on the basis thereof, to reverse the judgment of the Court of Appeals and remand this case for a new trial for appellants.

CONCLUSION

For the reasons given above, a writ of certiorari should be granted.

Respectfully submitted,

JOHN J. PICHINSON
Wilson Tower
Corpus Christi, Texas, 78401
Attorney for Petitioners

APPENDIX A

INDEXED

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

Israel Esparza RANGEL, a/k/a Ray Range, a/k/a Ray Reyna, a/k/a Ray Ruiz, and David Esparza Rangel, Jr., Defendants-Appellants.

No. 73-2787

Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

Feb. 4, 1974.

In a joint trial before the United States District Court for the Southern District of Texas, Owen D. Cox, J., first defendant was convicted on one count of importation of marijuana and on one count of distribution of marijuana and second defendant was convicted on one count of distribution. The defendants appealed. The Court of Appeals held that evidence supported trial court's finding that coparticipant voluntarily consented to the government's interception and recording of telephone conversation between the coparticipant and first defendant, that the admission of the taped conversation did not prejudice second defendant and that the phrasing of question by the prosecuting attorney in the cross-examination of second defendant, which defendants asserted could have been

* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al., 5 Cir., 1970, 431 F.2d 409, Part I.

construed as implying misconduct on the part of their attorneys, did not deprive defendants of their right to assistance of counsel.

Affirmed.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, Chief Judge, and DYER and SIMPSON, Circuit Judges.

PER CURIAM:

Appellant, Israel Rangel, was convicted on one count of importation of marijuana into the United States under 21 U.S.C.A. §§ 960(a)(1) and 952(a) and on one count of distribution of marijuana under 21 U.S.C.A. § 841 (a)(1). Appellant, David Rangel, was convicted on one count of distribution. We affirm.

Appellant, Israel Rangel, complains here of the admission at trial of a tape recording made by Customs agents of an incriminating telephone conversation between Israel Rangel and so-defendant Murray (currently a fugitive from justice). After Murray had been arrested and taken to the Customs Office in connection with his participation in the scheme to import and distribute the marijuana he called Israel Rangel from the Customs Office. The Customs agents recorded the call. Statements made by Israel Rangel during the course of the conversation warranted the inference that he was a participant in the drug transactions. The tape was played twice before the jury. 18 U.S.C.A § 2511(2)(c) provides that:

> "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire

> or oral communication where * * * one of the parties to the communication has given prior consent to such interception."

[1] Appellant, Israel Rangel, contends that the government did not carry its burden of showing that co-defendant Murray voluntarily consented to the government's interception of the conversation. We disagree. We think that there was sufficient evidence on the record to justify the District Court's conclusion that Murray did voluntarily consent to the recording. Murray was unavailable to testify. The Government produced one of the Customs agents who was present who testified that Murray had been given his Miranda warnings when taken into custody, that he asked Murray whether he had his permission to tape the telephone call to Rangel and Murray replied "yes", and that Murray was shown all of the taping equipment before the call was placed.

We reject Appellant's contention that the Government did not present a detailed enough description of the events in the Customs Office preceding the telephone call to warrant a finding of voluntary consent. Appellant had full opportunity to cross-examine the Customs agent who testified. Furthermore, Appellant's counsel strenuously objected whenever the Government attempted to elicit testimony concerning the conversation between Murray and the agent on the question of consent.

[2] Unlike extrajudicial statements implicating a co-defendant, Bruton v. United States, 1968, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476, this conversation implicated Israel only.[1] Thus we find no merit in Appellant

1. The brief conversation, in which no names were mentioned, was devoted to the arrangement of a meeting after a previously scheduled one had failed to materialize.

David Rangel's contention that the admission of the taped telephone conversation against Israel Rangel unduly prejudiced David Rangel, especially in light of the Court's careful instruction that the conversation was admissible only against Israel Rangel.

[3, 4] Appellants assert that the phrasing of a question by the prosecuting attorney in the cross-examination of David Rangel was so prejudicial as to require a mistrial since it might have been construed as implying misconduct on the part of the attorneys. The Court promptly sustained Appellant's objection to the question. We reject the claim that the phrasing of this question by the prosecutor deprived appellants of their Sixth Amendment right to assistance of counsel by discrediting Appellant's counsel in the eyes of the jury. Nor in the totality of this record was any likely prejudice demonstrated. See United States v. Steinkoenig, 5 Cir., 1973, 487 F.2d 225.

Affirmed.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1973

No. 73-2787
Summary Calendar

D. C. Docket No. CR 72-C-153

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ISRAEL ESPARZA RANGEL, a/k/a RAY RANGE, a/k/a RAY REYNA, a/k/a RAY RUIZ, and DAVID ESPARZA RANGEL, JR.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

Before BROWN, Chief Judge, DYER and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 4, 1974

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In the Supreme Court of the United States

OCTOBER TERM, 1973

ISRAEL ESPARZA RANGEL AND
DAVID ESPARZA RANGEL, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1307

ISRAEL ESPARZA RANGEL AND
DAVID ESPARZA RANGEL, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that a telephone conversation between petitioner Israel Rangel and an informant, which a government agent tape-recorded with the informant's permission, was erroneously received in evidence because the government failed to establish that the informant's consent was voluntary.

Following a jury trial in the United States District Court for the Southern District of Texas, both petitioners were convicted of distributing marihuana, in violation of 21 U.S.C. 841(a)(1), and petitioner Israel Rangel was in addition convicted of importing the drug, in violation of 21 U.S.C. 952(a) and 960(a)(1). Petitioners were each sentenced to four years' imprisonment and to special

parole terms of four years (A. 1-4).[1] The court of appeals affirmed (Pet. App. 11-16).

Petitioners' only contention is that a telephone conversation between petitioner Israel Rangel and Charles Murray (a co-defendant who was a fugitive at the time of trial), in which Rangel made statements warranting the inference that he had participated in the marihuana transactions (see Pet. 4-5), and which a Customs agent tape-recorded with Murray's permission, was erroneously received in evidence.[2] It is claimed that the government failed to show adequately that Murray consented to interception of the call.[3] Murray placed the call from the Customs office shortly following his arrest. The evidence on the voluntariness issue showed that Murray had been given the *Miranda* warnings prior to the placing of the call; that the agent, after displaying the taping equipment to Murray, asked him if he had his permission to record the call; and that Murray answered "Yes" (A. 42-46). Although counsel for petitioners had full opportunity to cross-examine the agent as to any other attendant circumstances, counsel made no pertinent additional inquiries (A. 46-48).

There is no merit to petitioners' claim that the government failed to present a detailed enough description of

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[1]"A." refers to the appendix to petitioners' brief in the court of appeals, a copy of which is being lodged herewith.

[2]The court of appeals correctly noted that this objection is not available to petitioner David Rangel, since the conversation did not implicate him; the jury was instructed that it was admissible only against petitioner Israel Rangel (Pet. App. 13-14).

[3]18 U.S.C. 2511(2)(c) provides that it shall not be unlawful for a person acting under color of law to intercept a wire communication where one of the parties to the communication has given prior consent to the interception. Cf. *Rathbun* v. *United States*, 355 U.S. 107; and see *United States* v. *White*, 401 U.S. 745.

the events preceding the call to warrant a finding that Murray voluntarily consented to its recordation (Pet. 8-9). The trial court was amply warranted in concluding from the government's substantial *prima facie* showing, which the defense made no effort to counter, that Murray freely consented to the interception.[4] The court's inference was particularly justified in light of the undisputed fact that the record is devoid of any evidence suggesting that any improper pressure was exerted to induce consent. It is reasonable to assume that Murray was motivated to cooperate with the agent in the manner he did by the hope that, as a consequence, he would be dealt with more leniently. It is well established, however, that an informant's consent to the government's monitoring of a phone conversation to which he is a party is not vitiated by the fact that it may be motivated by a hope, or even a promise, of leniency. *United States* v. *Silva*, 449 F. 2d 145 (C.A. 1), certiorari denied, 405 U.S. 918; *United States* v. *Jones*, 433 F. 2d 1176, 1180-1181 (C.A. D.C.), certiorari denied, 402 U.S. 950; *Baker* v. *United States*, 430 F. 2d 499, 503 (C.A. D.C.), certiorari denied, 400 U.S. 965; *Good* v. *United States*, 378 F. 2d 934, 936 (C.A. 9); *McClure* v. *United States*, 332 F. 2d 19, 22 (C.A. 9), certiorari denied, 380 U.S. 945.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

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[4]Indeed, as the court of appeals noted, petitioners' counsel "strenuously objected whenever the Government attempted to elicit testimony concerning the conversation between Murray and the agent on the question of consent" (Pet. App. 13). See A. 15-20, 43-46.